

STATE OF MICHIGAN
COURT OF APPEALS

RONALD BENCE,

Plaintiff-Appellant,

v

COTTMAN TRANSMISSION SYSTEMS,
PISCES TRANSMISSIONS, INC., and TODD
LEFF,

Defendants-Appellees.

UNPUBLISHED

February 1, 2007

No. 262537

Ingham Circuit Court

LC No. 03-000030-CK

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order denying his motion to revive his complaint and for leave to amend the complaint. For the reasons set forth in this opinion we affirm the circuit court's order of dismissal. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In September 2000, plaintiff entered into several agreements with defendants to acquire and operate a transmission center. As part of this transaction, plaintiff and defendant Cottman executed a license agreement that gave plaintiff the right to use the Cottman name and trademarks. The agreement also contained a choice of law provision that specified that "any matter whatsoever which arises out of or is connected in any way with the Agreement or the franchise shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania."

In November 2002, Cottman initiated an audit of plaintiff's franchise that began a series of events that culminated in the present action. According to Cottman, the audit revealed that plaintiff was under-reporting sales in violation of the license agreement. Plaintiff denied that allegation. Nevertheless, on February 3, 2003, Cottman responded by disconnecting the telephone lines at plaintiff's franchise and redirecting all calls to nearby franchises until February 7, 2003, when Cottman assumed management of plaintiff's franchise.

On January 7, 2003, plaintiff filed an action in the Ingham Circuit Court, alleging violations of the Michigan Franchise Investment Law ("MFIL"), MCL 445.1501 *et seq.*, and breach of contract against defendants. Plaintiff requested, among other things, rescission of the franchise agreement and damages for breach of the contract. In February 2003, defendants filed

a complaint in Montgomery County, Pennsylvania, alleging that plaintiff defaulted on a promissory note. Defendants filed a second complaint in Montgomery County two weeks later, alleging that plaintiff also committed fraud and breached the license agreement. The next day, defendants removed plaintiff's Ingham County action to the U.S. District Court for the Western District of Michigan on the basis of diversity of citizenship. Soon thereafter, that court remanded plaintiff's lawsuit back to the Ingham Circuit Court. No further action was taken on plaintiff's Ingham County lawsuit, and the lower court's docket indicates the case was closed on March 14, 2003.

In September 2003, defendants' Montgomery County, Pennsylvania complaints were consolidated and removed to the U.S. District Court for the Eastern District of Pennsylvania. In response to defendants' complaints, plaintiff asserted counterclaims for breach of contract, violation of the MFIL, and tortious interference with existing and prospective contracts. The court ultimately dismissed plaintiff's tortious interference counts, reasoning that they were not recognized under Pennsylvania law. The court also dismissed plaintiff's MFIL counts—choosing to apply Pennsylvania law instead—but granted plaintiff leave to amend his counterclaim to conform to Pennsylvania common law. Defendants contend, and plaintiff does not dispute, that plaintiff did not amend his counterclaim.

After a bench trial, the Pennsylvania federal court entered judgment in favor of defendants, finding that plaintiff had breached the promissory note by failing to make payments due under it. The court also found that plaintiff had breached the license agreement by (1) failing to make payments due under it, (2) failing to make good on rejected electronic funds transfers, (3) failing to report all business transacted at the franchise, (3) ceasing the conduct of business at the center for more than five consecutive business days, (4) failing to honor customer warranty claims, and (5) failing to make payments due under the promissory note pursuant to the cross-default provision of the note. As to plaintiff's breach of contract counterclaim, the court found that defendants' acts were permissible under the clear contractual provisions and thus there was no breach. Despite holding for defendants, the court declined to award damages in their favor, finding that they had effectively mitigated their damages by re-selling the franchise.

While defendants' Pennsylvania lawsuit was proceeding, plaintiff filed a second complaint in the Ingham Circuit Court against defendants, alleging violations of the MFIL, breach of contract, conversion, disparagement/slander, and unjust enrichment. Defendants successfully removed this second suit to the U.S. District Court for the Western District of Michigan where it was ultimately dismissed due to the res judicata effect of the Pennsylvania federal court's decision, which had been issued the week before. The Michigan federal court reasoned that although res judicata barred plaintiff's second suit in that court, plaintiff might still be able to proceed with his original case in the Ingham Circuit Court. Subsequently, plaintiff filed the motion at issue in the instant case to revive and amend his original complaint in the Ingham Circuit Court.

Plaintiff's sole argument on appeal is that the doctrine of res judicata does not bar him from pursuing his claims against defendants.

We review de novo a lower court's determination that res judicata bars a subsequent suit. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). We review for an abuse of discretion a lower court's removal of a case from the no-progress docket

or the dismissal of a cause of action for want of prosecution. *Eliason Corp v Dep't of Labor*, 133 Mich App 200, 203; 348 NW2d 315 (1984).

Appellate review of the lower court's decision not to reinstate a case is restricted to determining whether there is any justification in the record for the ruling. *Hurt v Cambridge*, 21 Mich App 652, 658; 176 NW2d 450 (1970). In this case, the record justifies the lower court's finding that res judicata bars plaintiff's causes of action against defendants.

Our Supreme Court has examined the Restatement of Judgments, 2d, in construing whether subsequent claims would be precluded. See, e.g., *Pierson*, *supra* at 379. The Restatement of Judgments, 2d, provides the following guidance to the present situation:

A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealings as had been alleged in the federal action. Even if diversity of citizenship between the parties did not exist, the federal court would have had "pendent" jurisdiction to entertain the state theory. Therefore unless it is clear that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred. [1 Restatement of Judgments, 2d, ¶ 25, comment 3, illustration 10, pp 213-214.]

Both Michigan and the federal system have adopted a broad approach to the application of res judicata. *Pierson*, *supra*.

Res judicata generally bars a second suit in state court after an initial judgment on the merits in federal court. *Pierson*, *supra* at 380. See also 18 Moore, Federal Practice, ¶ 131.21(3)(d). Under federal claim preclusion law, a subsequent action between the same parties or their privies is barred when it is

"based upon the same claims or causes of action that were or could have been raised and litigated in a prior action." The doctrine applies when there is: (1) a final decision on the merits; (2) a subsequent action between the same parties; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. A dismissal for failure to state a claim is a judgment on the merits for res judicata purposes. [*Reynosa v Schultz*, ___ F Supp 2d ___; 2006 WL 2708619 (WD Mich, September 20, 2006) (citations omitted), slip op, p 2.]

Plaintiff and defendants do not contest the fact that the same parties or their privies were involved in both the previous and instant cases.

In this case, the Pennsylvania federal court dismissed plaintiff's MFIL-based counterclaim against defendants under Federal Rule of Civil Procedure 12(c). Applying federal choice-of-law principles, the court applied the Pennsylvania common law for actions for fraud

and material misrepresentation, and granted plaintiff leave to amend his counterclaim in accordance with that ruling.

Although plaintiff contends the Pennsylvania federal court's grant of defendants' FRCP 12(c) motion was a dismissal without prejudice, defendants correctly point out that an order dismissing a claim under FRCP 12(c) is a decision on the merits, which precludes subsequent litigation on the merits of that claim between the same parties or their privies. *Bliss Clearing Niagara, Inc v Midwest Brake Bond Co*, 339 F Supp 2d 944, 957 (WD Mich, 2004).

Plaintiff first argues that Michigan has a "compelling interest in the administration of its expressed public policy which cannot be abrogated to Pennsylvania and the judgment in the Pennsylvania action cannot be given full faith and credit." Similarly, plaintiff contends the Pennsylvania federal court failed to give "the MFIL the appropriate weight with respect to the strong public policy interests it represents in Michigan."

Clearly, Michigan has a very strong public policy interest in applying the MFIL. *Martino v Cottman Transmission Systems, Inc*, 218 Mich App 54, 59-60; 554 NW2d 17 (1996). In *Martino*, this Court noted that the Pennsylvania franchise statute, unlike the MFIL, did not contain a requirement that the franchisor must notify the prospective franchisee of contractual provisions that the statute renders unenforceable. *Id.* at 60. Therefore, this Court found that applying Pennsylvania law to Martino's case would effectively override Michigan's law and abrogate Martino's right to rescind. *Id.*

However, in the related Pennsylvania litigation, the federal court found that plaintiff's counterclaim that defendants failed to provide the requisite disclosures under the MFIL was tantamount to a fraud claim under Pennsylvania common law. Hence, because Pennsylvania common law gives protections analogous to the MFIL in regard to plaintiff's claims, Michigan law is not contravened by its application and public policy does not preclude res judicata from barring plaintiff's MFIL claims in a Michigan state court.

Next, plaintiff cites *Martino, supra*, for the proposition that only in Michigan will his MFIL claim be given appropriate treatment and consideration. However, as noted above, Pennsylvania's common law fraud tort provides a similar cause of action to plaintiff's MFIL claim. Moreover, the facts of *Martino* are distinguishable from the instant case in several respects. In *Martino*, Cottman filed a lawsuit against Martino in Pennsylvania for breach of the franchise contract. *Martino, supra* at 57. Martino, rather than answering or filing a counterclaim (as did plaintiff in the instant case), filed an action in Michigan state court for rescission under the MFIL, alleging that Cottman failed to provide proper notice as required by the Michigan statute. *Id.* In the meantime, a default judgment was entered against Martino in the Pennsylvania court. *Id.* On this basis, Cottman argued that res judicata barred Martino's subsequent Michigan action for rescission. *Id.* However, this Court reasoned that because a different set of proofs is required for Cottman's breach of contract action in Pennsylvania and Martino's MFIL action in Michigan, res judicata did not bar Martino's claim for rescission under MFIL. *Id.* at 58. Importantly, this Court noted that "[w]ere the issue before us the enforcement of the Pennsylvania judgment [against Martino], we would conclude that the judgment must be enforced." *Id.*

In this case, unlike in *Martino*, there is a Pennsylvania judgment in defendants' favor that must be enforced through the doctrine of res judicata. The Pennsylvania federal court found that plaintiff, not defendants, breached the license agreement under its clear terms.

It is true, as plaintiff contends, that Pennsylvania does not have a franchise statute similar to the MFIL, in which plaintiff's rescission claim was grounded. *Martino, supra* at 59. For that reason, the *Martino* Court held that the fact that Martino did not raise rescission under the MFIL as a counterclaim in the Pennsylvania action for breach of contract did not bar Martino from raising the claim in the Michigan court. *Id.* However, it is not necessarily true that only a Michigan court can provide effective protection to a Michigan franchisee. An examination of Pennsylvania law and the federal court's opinion both indicate that plaintiff might have been entitled to rescission of the license agreement on the grounds of common law fraud and misrepresentation had he chosen to amend his counterclaim. See *Boyle v Odell*, 605 A2d 1260, 1265 (Pa Super, 1992).

Inexplicably, plaintiff chose not to take advantage of the court's leave to amend his counterclaim to conform to Pennsylvania common law. Because res judicata applies as a bar not only to claims actually tried, but also "to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time," *Pierson, supra* at 380, plaintiff's MFIL claims that could have been brought in the Pennsylvania lawsuit as common law torts are barred in the Michigan state court.

Next, plaintiff argues that he "has not lost those state claims that didn't make it into the Pennsylvania litigation," and that he can pursue the state claims that were not adjudicated by the Pennsylvania federal court and that were dismissed without prejudice by the Michigan federal court, including the claim related to the MFIL.

However, the Pennsylvania federal court's dismissal of plaintiff's MFIL claims under FRCP 12(c) was on the merits. Therefore, res judicata precludes plaintiff from bringing the claim in a subsequent action. *Reynosa, supra*. In addition, as discussed *infra*, the Pennsylvania federal court also decided plaintiff's breach of contract claims on their merits, so they are similarly barred by res judicata. *Reynosa, supra*. Finally, the Michigan federal court's dismissal of plaintiff's second lawsuit against defendants was actually with prejudice, despite what plaintiff argues to this Court.

Although it is not clear under which federal rule the Michigan federal court dismissed plaintiff's claims, its decision was based on the fact that the res judicata effect of the Pennsylvania federal court's decision permanently barred plaintiff's subsequent MFIL and breach of contract claims in the federal courts. See *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co*, 223 Mich App 559, 562; 567 NW2d 456 (1997). Therefore, plaintiff's MFIL and breach of contract claims must have been dismissed with prejudice. As to plaintiff's claims of "newly discovered evidence" of conversion, slander/disparagement, and unjust enrichment, the Michigan federal court reasoned that the state court was "the appropriate forum for a rather expeditious amendment of the complaint [from plaintiff's first lawsuit] to be had in this case." Because the Michigan federal court dismissed plaintiff's second lawsuit so that plaintiff could "go back to Ingham County [and the first lawsuit] where the original case was remanded back to," the federal court intended that plaintiff could not refile in that court. Therefore, plaintiff's tort claims must have been similarly dismissed with prejudice.

Plaintiff cites this Court's opinion in *Bergeron v Busch*, 228 Mich App 618; 579 NW2d 124 (1998), for the proposition that "[u]nlike MCR 2.203(A)(1), the federal court rules do not require a plaintiff in federal court to assert all claims arising out of the same transaction in one action" (quoting *Bergeron, supra* at 622). Therefore, plaintiff reasons that because he did not amend his counterclaim in the Pennsylvania federal case to conform to Pennsylvania law, his MFIL claim is not precluded by res judicata. However, this Court also noted in *Bergeron* that "a plaintiff's ability to split his cause of action is limited by the doctrine of claim preclusion/res judicata." *Id.* Therefore, because the doctrine of res judicata effectively bars all of plaintiff's MFIL claims in the Michigan court, he was obligated to assert those claims in the federal litigation.

Moreover, the facts of this case differ substantially from *Bergeron, supra*. In *Bergeron*, this Court noted that the federal court had declined pendent jurisdiction over state law claims after having dismissed the plaintiff's accompanying federal law claims. *Id.* at 624. In contrast, in the present case, the federal courts accepted jurisdiction but dismissed plaintiff's MFIL claims. Because a decision under FRCP 12(c) is a judgment on the merits, *Bliss, supra* at 957, res judicata applies to bar plaintiff's MFIL claims that were or could have been brought in the federal court.

Finally, plaintiff argues that the non-MFIL claims (i.e., breach of contract, conversion, disparagement/slander, and unjust enrichment) should not be precluded because some of the underlying events only became known when the Pennsylvania case was nearing trial. However, plaintiff's statement of his Question Presented to this Court does not address his non-MFIL claims against defendant. In general, issues not included in a party's statement of questions presented are waived on appeal. *Van Buren Twp v Garter Belt, Inc.*, 258 Mich App 594, 632; 673 NW2d 111 (2003). Nevertheless, "this Court may consider an issue raised in a nonconforming brief if it is one of law and the record is factually sufficient." *Id.*

In this case, we will review plaintiff's non-MFIL claims because whether they are barred by res judicata is a question of law and the record contains facts sufficient for us to make a determination.

We review for an abuse of discretion a lower court's decision to deny leave to amend a complaint. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Id.* An amendment to a complaint is futile if the amended complaint would be legally insufficient on its face. *McNees v Cedar Springs Stamping Co.*, 184 Mich App 101, 103; 457 NW2d 68 (1990). In this case, plaintiff's non-MFIL allegations against defendants are barred by res judicata from being heard in the Michigan courts. Therefore, granting leave to plaintiff to amend his complaint to add the charges would be futile, and the lower court did not abuse its discretion in refusing to do so.

Plaintiff's complaint included a breach of contract count against defendants on the ground that they allegedly failed to provide services to him under the license agreement, such as assisting him in finding and evaluating personnel and negotiating and obtaining a lease. Plaintiff further contended that defendants unilaterally terminated the license and severed its relationship with him in violation of the agreement. Because the Pennsylvania federal court heard and decided plaintiff's counterclaim for breach of the license agreement, these allegations clearly

either were already adjudicated in the Pennsylvania litigation or could have been brought with reasonable diligence.

In addition, plaintiff argues that the facts supporting the claims for conversion, disparagement/slander, and unjust enrichment are different from any of those actually litigated. But plaintiff does not allege that the supporting facts were unknown to him until after the commencement of the Pennsylvania trial. Rather, plaintiff asserts that “some of these events only became known at a time when the Pennsylvania action was nearing trial.” Moreover, the facts necessary to support plaintiff’s unjust enrichment claim, which relates to his allegation that “[d]efendants have occupied the subject property rent-free,” must have been known to him at the time Cottman took over plaintiff’s franchise—more than one year before the Pennsylvania trial. Therefore, because plaintiff’s non-MFIL claims could have been brought in the Pennsylvania lawsuit, they are barred by res judicata from being raised in the Michigan state court. *Pierson*, *supra* at 380.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper